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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA

7
8 JUAN LORENZO SOTO, No. C-13-5931 EMC (pr)
9 Petitioner,

10 v.

11 R.T.C. GROUNDS, Warden,
12 Respondent.

13
14 ORDER DENYING PETITION FOR
15 WRIT OF HABEAS CORPUS

16
17 I. INTRODUCTION

18 Juan Lorenzo Soto filed this *pro se* action seeking a writ of habeas corpus under 28 U.S.C. § 2254. In his petition, Mr. Soto contends that his federal constitutional rights were violated by the trial court's admission of evidence about statements his co-perpetrator had made to a girlfriend. The petition will be **DENIED**.

19 II. BACKGROUND

20 A. The Crimes

21 The California Court of Appeal described the events that led to Mr. Soto's conviction for
22 murder and other crimes.

23 On the morning of July 25, 2004, defendants Juan Lorenzo Soto and
24 Francisco Javier Valenciano, Jr., along with Anthony Gonzales, drove
25 from Watsonville to Santa Cruz to commit a robbery. They were
26 armed with a shotgun and a pistol. The liquor store they intended to
27 rob was too busy, so the three men decided to rob a group of men they
28 had seen playing cards in a nearby driveway, with a pile of money on
the ground. When Gonzales, armed with the shotgun, and Soto, armed
with the pistol, approached the card players and directed them to hand
over their money, all but one of them, Rodolfo Escobar, complied.
Escobar instead insulted Gonzales, and picked up the money off the
ground. As one of his friends implored him to cooperate with the

gunmen, Escobar said he had to work hard for his money to support his family, and that if Gonzales wanted his money, he should ask [his] mama for [it]. Gonzales pressed the shotgun against Escobars forehead and pulled the trigger, blowing off the top of his head. Gonzales and Soto collected the money off the ground, went back to the car, where Valenciano had been acting as a lookout, and drove off.

⁵ *People v. Soto*, 2012 WL 2393081, *1 (Cal. Ct. App. June 26, 2012) (alterations in original).

6 The police officers who responded to the scene spoke to several men present who described
7 the events of the robbery and shooting. Some of the men gave general descriptions of the men who
8 had robbed them. While the police were talking to the victims, another man approached one of the
9 officers and “described seeing a green Honda, containing four males, leave the scene just after the
10 shooting. The man had written down the Honda’s license plate number, so [officer] Vasquez
11 broadcast the description of the car and the license plate number.” *Id.* at *2. Several of the
12 percipient witnesses to the shooting and robbery were unable to identify the perpetrators, but some
13 later were able to do so at least tentatively.¹

14 The California Court of Appeal also summarized evidence developed after the investigation
15 at the scene of the crime, including the testimony of Vanessa Martinez.

7. Vanessa Martinez

Martinez met Gonzales when she was 18, at the house of Francisco "Frankie" Valenciano. After Gonzales was incarcerated for violating his parole, Martinez developed a relationship with him through letters, phone calls and prison visits. When he was released in March 2002, they lived together at his grandparents' house and in January 2003, she gave birth to Gonzales' child. In mid-July 2004, Martinez bought her own home in Watsonville and Gonzales moved in with her.

21 During this time, Martinez learned that Gonzales was a gang member.
22 She saw his tattoos, including "VGV" (for Varrio Green Valley) on his
stomach and "Norteno" across his lower back, and asked him about

1 them. Gonzales also cut his hair in a fade hairstyle called a
2 Mongolian. He also owned a lot of Oakland Raiders clothing.

3 From April to December 2003, Gonzales was incarcerated at the Santa
4 Cruz county jail for possession of marijuana for sale. Valenciano gave
5 Martinez \$25 a month to put on Gonzales' book to buy items at the
6 commissary, money to give to Andrea Gonzalez, who had a son with a
7 VGV gang member; and \$1,500 to give to Gonzales' mother for an
8 attorney. He also gave Martinez Christmas cards containing money to
9 mail. While in county jail, Gonzales obtained more tattoos, including
10 "14," which stands for the Northern gang, on his chest, and stars on
11 his left shoulder.

12 As a gang member, Gonzales was obligated to pay monthly "taxes" or
13 dues to the gang. Oscar Cabrera, a member of a Norteno gang and the
14 Nuestra Familia prison gang, would beat up members who failed to
15 pay their taxes. Martinez witnessed Cabrera beating up a VGV gang
16 member, Armando Cardenas, for such a failure.

17 Martinez had known Valenciano for about two years, and first met
18 Soto about a week or two before July 25, 2004. She believed both
19 men were also gang members.

20 The week before the shooting, Martinez twice heard Valenciano tell
21 Gonzales he needed money. Valenciano said that if Maria Zamora did
22 not lend him money, he was going to rob somebody. Valenciano
23 needed the money because his car was impounded and he had to pay
24 \$200 in tax to Cabrera, which he and Gonzales paid monthly.
25 Gonzales also needed money. She knew that if Valenciano and
26 Gonzales did not pay, they would be beaten up.

27 On July 24, 2004, at around 6:00 or 7:00 p.m., Charal Hernandez came
28 to Martinez's house to have her hair and make-up done for a party.
29 Valenciano, Soto and Julio Cabrera, Oscar Cabrera's brother, were
30 there, too. Gonzales asked Martinez to leave them and go upstairs.
31 Soto, who was dating Hernandez, asked to borrow her car, a 1999
32 green Honda Accord EX. Hernandez agreed, and Soto drove her to
33 the party down the street. At 9:00 p.m., Soto, Valenciano and
34 Gonzales left in Hernandez's car, while Julio walked down the street
35 to the party.

36 Soto, Valenciano and Gonzales returned sometime after midnight.
37 Valenciano left, but Soto stayed overnight, as did Hernandez.

38 The next morning, Sunday, July 25, Soto asked Hernandez if he could
39 borrow her car again. Hernandez refused at first, and asked why. She
40 offered to drive him where he wanted to go, but he took the keys from
41 her and knocked on the door to Gonzales' bedroom.

42 It was about 7:00 or 8:00 a.m. when Soto knocked on the door, but
43 Gonzales did not answer. Soto knocked again, and Gonzales kissed
44 Martinez and told her he would be right back.

45 Some time later, Martinez was driving with her son, her younger sister
46 and Hernandez to get breakfast. Gonzales called her cell phone, and

1 said that Soto needed to talk to Hernandez. Martinez gave the phone
2 to Hernandez, and Soto told her she needed to report that her car had
3 been stolen. She asked what happened, but Soto did not explain. He
4 was upset and said to just report that it was “fuckin’ stolen.”
Hernandez was crying, as the car was registered to her grandparents
and she did not know how to explain to them about their car. She
refused to call 911.

5 Martinez warned Hernandez they would be in trouble if they did not
6 do as they were told. She was worried that the call might have
7 something to do with the robbery that Gonzales and Valenciano
8 discussed a few days prior, and was also worried that any blame would
fall on Gonzales because he was on parole and was not supposed to be
around other gang members, such as Soto and Valenciano. Hernandez
agreed to call the police and report the car stolen, so she and Martinez
fabricated a story about how the car was stolen from in front of
Martinez’s house the night before.

10 Martinez then noticed she had missed a call from Gonzales and called
11 him back, telling him she and Hernandez had filed a police report.
12 While talking to her, Gonzales seemed distracted, and yelled at Soto,
“[W]here’s [Valenciano]?” She could hear people talking in the
background and Gonzales said, “Excuse, excuse me, where’s
[Valenciano]? Where the fuck is [Valenciano]?” Martinez heard either
Gonzales or Soto say, “There he is at the payphone.” Gonzales said
that they were in Santa Cruz and asked her to pick him up. Martinez
initially said no, but called back 20 minutes later to ask if he still
needed a ride. Gonzales said he did not.

15 Julio called Martinez later in the afternoon and told her to come by his
16 house with her son. When she arrived she saw Soto, Valenciano,
17 Gonzales, Julio and Oscar sitting in a truck outside. Gonzales told
Martinez he was going to Mexico. He was emotional and told her he
was sorry. Soto told Martinez to tell Hernandez he was sorry.

18 The next day, however, Martinez saw Gonzales at his grandmother’s
19 house. He had a bad case of poison oak. She asked him what had
20 happened but he could not really speak. She drove him back to their
home, and about a week later, he was arrested. During that week,
Gonzales told Martinez what had happened on July 25, 2004.

21 Gonzales told Martinez he and Soto went to rob a liquor store in Santa
22 Cruz, with Valenciano driving. Because the store they had selected
23 was crowded, they drove around the block. As they did, they saw
some men playing poker in a driveway, with money lying on the
24 ground. They pulled over and robbed the guys, with Valenciano
staying by the car as he and Soto confronted the men. Gonzales said
one of the men was killed after trying to take back his money and
25 talking back to the shooter. Gonzales denied killing the man even
though Martinez asked him many times. When describing how the
26 man was shot, Gonzales said Soto “ate brains.”

27 They fled after the shooting, and Gonzales might have been driving at
28 that point. They had a police scanner and heard that the police were
looking for the Honda so they left the car by a creek or river and threw

1 the weapons in the bushes. Gonzales said they were in Santa Cruz
2 when Soto called Hernandez and told her to report the car had been
stolen.

3 Also during the week before his arrest, Martinez saw Gonzales
4 dividing up about \$150 in cash. As he did so, Gonzales said to
himself, "One for Soto," "one for Valenciano," and "one for me."
5 Gonzales seemed angry with Valenciano and felt the "whole thing"
was his fault. Gonzales said the money was going to Julio and Oscar
Cabrera.

6 Before his arrest, Gonzales told Martinez and Hernandez not to talk to
7 the police. After Gonzales and Soto were arrested, Valenciano waved
8 Martinez over as she was driving one day. He told her not to talk to
the police and that there was no evidence. He said if she needed to
9 talk to him, she should do so in person, so there would be no phone
records.

10 When Martinez was interviewed by Detective Christine Bentley, she
11 did not tell the truth because she was afraid of Oscar Cabrera, who had
12 threatened both her and Hernandez. Martinez believed Oscar would
13 kill her if she cooperated with the police. On July 31, 2004, Oscar had
14 gone to her parents' house looking for her, but she was not there. She
15 arranged to meet Oscar at Valenciano's parents' house later that day.
When she arrived, she saw Valenciano's father was bleeding from a
wound on his head. Oscar had asked Valenciano's father for money to
post bail, and when he refused, Oscar slashed his head open. Martinez
met with Oscar later and he reminded her that people who talk to the
police end up dead.

16 Martinez lied about a number of things over the course of several
17 interviews with Bentley, including that Gonzales was working on his
car at his grandmother's house on the morning of the murder. After
18 being arrested and threatened with prosecution, Martinez told Bentley
essentially the same story that she testified to at the trial. She did not
recall, however, asking Bentley to fabricate evidence against Soto.
After the first time she testified in the case, she moved out of the area
19 and changed her name.

20 8. Alberto Anguiano and Maria Zamora

21 Alberto Anguiano worked with Valenciano and Gonzales in
22 Watsonville for a couple of months at Sambrailo Packaging. They
23 became friends and Anguiano cut their hair weekly. He knew that
24 Valenciano was a gang member because he had a tattoo that read
"Norteno" on the back of his head. Anguiano knew that Gonzales was
also a gang member because he had a tattoo of the "Northern star" on
25 his left arm, and had a fade haircut with a "Mongolian" ponytail.

26 On July 25, 2004, at 10:20 a.m., Anguiano called Gonzales, who
27 answered, but seemed hurried. Gonzales passed the phone to
Valenciano who asked Anguiano for Maria Zamora's phone number.
Valenciano was interested in Zamora, who also worked at
28 Sambrailo's. Before hanging up, he told Anguiano to call him later.

1 Later that afternoon, Anguiano called Valenciano at his house, but
2 could not reach him and did not leave a message.

3 Zamora confirmed she worked with Valenciano and Gonzales at
4 Sambrailo's Packaging for a few months. At about 11:18 a.m. on July
5 25, 2004, Valenciano called Zamora on her cell phone. She told
6 Valenciano she was on her half-hour lunch break at work. He did not
7 ask her for a ride and never said he was in trouble.

8 9. Further investigation, autopsy and forensic evidence

9 Meredith Baker used to date Soto in high school. After graduating,
10 she went to college and Soto went to "jail" so she did not see him for
11 approximately three years. At 10:31 a.m. on July 25, 2004, she got a
12 call from Soto. Soto hurriedly said, "Meredith, I really need you to
13 come get me. Can you please come get me." Meredith refused saying
14 she needed to get ready for work, but Soto pleaded with her, "Please, I
15 need you to do me a favor. Please come get me." She was upset and
16 struggled with her feelings for Soto, answering "I can't go through this
17 again." She asked where he was and Soto said he was off Frederick
18 Street. At a later date, Soto's sister Doreen came into Meredith's
19 workplace and told her she did not need to testify. If Meredith did
20 testify, Doreen said, it would be her fault if Soto went to jail.
21 Meredith believed that Soto was affiliated with the Nortenos. She did
22 not hear from him again.

23 Meredith's mother, Linda Baker, saw her daughter was upset because
24 she wanted to help Soto but could not. She later checked the caller ID
25 on Meredith's phone which showed the 10:31 a.m. phone call came
26 from Gonzales's phone number. Linda contacted the police and
27 Detective Bentley came to their house.

28 At 1:30 p.m. on the day of the shooting, Santa Cruz County Sheriff's
1 Deputy Daniel Brierley was assigned to find the suspect vehicle, a
2 1999 green Honda Accord with license plate number 4BFR732. He
3 went to every known Norteno gang house in Santa Cruz and started a
4 grid search. At the 400 block on Owen Street, with Clinton as the
5 nearest cross street, Brierley found the vehicle unoccupied next to a
6 bamboo hedge. Other officers arrived to secure the scene and assist in
7 collecting evidence. In the thick bamboo hedge, the officers found an
8 expended red 16-gauge shotgun shell, a sawed-off double-barrel
9 16-gauge shotgun, and a revolver loaded with three .38-caliber
10 bullets. When the vehicle was subsequently searched, officers found a
11 glove and collected samples of what appeared to be blood and tissue
12 from its interior.

13 On July 25, 2004, Lore James lived at the corner of Clinton and Owen
14 Street in Santa Cruz. Between 9:30 and 10:30 a.m., she left the house
15 and saw a green car across the street on Owen. She heard loud
16 rustling noises in the bushes across the street. As she walked out to
17 the sidewalk, she heard a car door close, and saw three young
18 Hispanic men, between 18 to 25 years old, walk from the green car
19 across the street toward her. They talked softly to each other, and one
20 man turned and looked directly at James as he passed. She drove
21 away, picked up her son and returned to find police securing the area.

1 James told Officer Northrup she had seen three Hispanic men in their
2 early 20s, five feet 10 inches to six feet tall. One had a medium build,
3 dark complexion and wore a red bandana and baggie jeans. Another
had a medium build, wore a white tank or v-neck shirt, baggie jeans, a
baseball cap and carried a white bag.

4 At approximately 7:52 p.m. on July 25, 2004, Katy O'Doyle, whose
5 front door faces Clinton Street, found a black Raiders sweatshirt in her
6 backyard. She turned the sweatshirt over to the police. A couple of
days later, Timothy Filed, who lived at Darwin and Clinton Streets,
7 found a red sweatshirt, a baseball cap, and a pair of gloves inside the
green waste trash can on the side of his home.

8 A DNA analysis on the red sweatshirt revealed three contributors from
9 a stain on the back of the neck area, near the tag. Escobar's DNA was
definitely present, and Soto and Valenciano could not be excluded as
contributors to the mixture. Gonzales was excluded as a contributor of
the DNA found on the sweatshirt.

10 Several different samples from the baseball cap were taken for DNA
11 analysis. The bill and outside of the cap contained only Escobar's
12 DNA. The tag included a mixture of DNA, with Valenciano
representing the major contributor with at least two minor
13 contributors. Soto could not be excluded as a possible minor
contributor to the DNA on the tag.

14 One of the two gloves from the trash can contained a mixture of DNA
15 consistent with two donors, Escobar and Soto. Soto could not be
excluded as a possible major contributor and Escobar was a possible
16 minor contributor. The other glove contained only Escobar's DNA.
The glove found in the Honda contained DNA from Escobar and
17 Gonzales. Soto and Valenciano were excluded as possible
contributors of DNA on the glove.

18 Samples from the black Raiders sweatshirt included DNA from
19 Escobar and Gonzales, and Escobar's blood was also found on the
sweatshirt. Soto and Valenciano were excluded as contributors to the
DNA found on that garment.

20 Santa Cruz Police Detective Warren Barry, along with other officers,
21 searched the neighborhood where the Honda and weapons were found,
looking for witnesses or businesses which may have videotapes. He
22 reviewed a security videotape from a gas station mini-mart at
Frederick and Soquel, but did not see any unusual activity and
23 returned it. A few days later, he saw a picture of Soto at a police
briefing and recalled seeing a man on the videotape with the same
24 tattoo on the back of his neck and short black hair. He mentioned this
to Northrup, who went to the mini-mart and obtained the video. The
video showed Soto purchasing a soda at the store on July 25, 2004, at
25 about 11:18 a.m. Barry obtained phone records for the payphone
outside the mini-mart, and those records showed three calls were made
at about the time of the murder: one at 11:03 a.m. to Valenciano's
26 mother; one to Jose Carranco, who lived with Valenciano's sister, at
11:13 a.m. and one to Zamora at 11:14 a.m.

1 On July 30, 2004, Bentley went to Hernandez's workplace and showed
2 her a still photo from the videotape to see if she could identify the
3 person as Soto. When she looked at the photo, she cried and became
4 hysterical, yet claimed she could not recognize the person in it since it
5 was too blurry.

6 According to Dr. Richard Mason, forensic pathologist for the Santa
7 Cruz County Coroner, Escobar was killed by a contact FN5 shotgun
8 wound to the head.

9 FN5. The barrel of the shotgun was in contact with
10 Escobar's head when it was fired.

11 10. Jailhouse informant's testimony

12 Nonu Randy Aluni was in the Santa Cruz jail, awaiting sentencing for
13 a bank robbery, when he met Soto, Gonzales and Valenciano. Aluni,
14 who was facing a sentence of 25 or 30 years for his role in the bank
15 robbery, agreed to testify in this case in exchange for a sentence of
16 between 10 and 13 years.

17 At separate times, Aluni was housed with Valenciano and Soto. Soto
18 told Aluni he was a member of VGV and he discussed the shooting.
19 Soto said the night before the shooting he and Gonzales planned to rob
20 a liquor store in Santa Cruz, and he and Gonzales drove to Santa Cruz
21 that morning in Hernandez's car. They first went to Valenciano's
22 house and picked up the guns. When they got to the liquor store, there
23 were too many people there, so they drove around the block and saw
24 some guys playing poker. They drove around the block again and
25 pulled over by the poker players. Valenciano stayed back at the car to
26 listen to the police scanner. Gonzales and Soto walked up to the men
27 and said, "Give me your money." One guy disrespected Gonzales so
28 he shot him. As they were walking away, Soto yelled out another
gang name, "Northside," to throw them off.

They got back in the car, drove down the block, hid the guns, threw
the clothes away and started running towards the creek. Valenciano
threw the police scanner, its batteries and the car keys in different
directions. Soto went with Gonzales to call Hernandez, and he told
her to report the car stolen. They caught up with Valenciano who was
calling for a ride from a payphone at a church. The three got a ride to
Hollister.

Soto showed Aluni a picture of himself taken by a gas station
surveillance camera and asked if he could see blood on Soto's shirt.
Soto claimed they committed the robbery because they needed the
money. He also said his father owned a mechanics shop and someone
there could provide him with an alibi.

At some point, Soto found out that Aluni was talking to the district
attorney, and he threatened to kill Aluni's family if he testified. Soto
had Aluni write a letter saying he made the whole thing up, and that he
had obtained information about the case by reading Soto's paperwork
when Soto was not in the cell. Aluni wrote a letter to his own
attorney, Charlie Stevens, and another to Soto's attorney. In his letter

1 to Stevens, Aluni lightly wrote in pencil that he was being threatened.
2 Aluni also told Stevens he had been threatened by Soto.

3 About a month before he was housed with Soto, Aluni was housed
4 with Valenciano who also told him about the shooting several times.
5 Valenciano's version was consistent with Soto's, but he added the
6 detail that the guns used belonged to their gang, VGV. Soto had the
7 revolver and Gonzales had the shotgun, which they hid in some bushes
8 after the robbery/shooting. They also hid some of their clothing in a
9 garbage bin, before running to a lake or creek where they discarded
the police scanner and car keys.

10 Aluni met Gonzales once, for 10 or 15 minutes, while in a holding cell
11 going into court. He told Gonzales he already knew why Gonzales
12 was in jail, and Gonzales described the robbery and shooting in much
13 the same way as Soto and Valenciano. Gonzales also admitted killing
14 Escobar.

15 *Soto*, at *6-*11. Evidence of gang activities and the defendants' gang membership also was
16 presented at trial. *Id.* at *11-*14.

17 Soto testified at trial. He admitted to being a Northern Hispanic and being a member of the
18 VGV gang in Watsonville, but denied paying gang taxes, denied having obligations toward fellow
19 gang members and denied having enemies among rival Sureno gangs. *Id.* at *14. He admitted to
20 being in Santa Cruz on the morning of the shooting but said he was there to look for a girl at the
21 Santa Cruz Bible Church, but didn't find her.

22 The night before, he stayed at Martinez's house with his friend,
23 Hernandez. Hernandez often gave him rides in her green Honda.
24 Gonzales asked him if he could borrow Hernandez's car the next day,
25 but did not say why he needed it.

26 The morning of July 25, Soto asked Hernandez for the keys to her car,
27 saying he wanted to go to church. She offered to give him a ride, but
28 he did not want her to know he was going to try to find a girl, so he
declined her offer. Eventually, she gave him the keys without much of
an argument.

29 He woke up Gonzales and they drove off. Gonzales drove and the
30 plan was to drop Soto off at the church, while Gonzales used the car.
31 They stopped at Valenciano's house to pick up Soto's cell phone and
32 Valenciano agreed to give Soto a ride back from Santa Cruz about
33 11:00 a.m. Gonzales and Soto drove to Santa Cruz and Soto got out by
34 the church. Gonzales drove away.

35 He wandered around the church area for about 20 minutes, but could
36 not find the girl. A stranger approached him and they had a brief
37 conversation, but Soto could not recall what they talked about or what
38 the man looked like.

1 Gonzales suddenly came up to Soto on foot and asked if he could give
2 him a ride “like right now.” Soto had not told Gonzales where he
3 would be in the church complex and the bench on which he was sitting
4 was not visible from the street, but somehow Gonzales found him.
Soto called an ex-girlfriend, Baker, whom he had not seen in four
years, but she could not pick them up.

5 Gonzales gave Soto his phone, telling him to call Hernandez and tell
6 her to report her car was stolen. At about that time, Soto saw a green
7 Honda driving down the street with people in the front and back, and
8 Soto realized that Gonzales needed to get rid of the car. He did not
ask questions because he did not want to be involved. Soto called
Hernandez and told her to report the car had been stolen. She did not
want to do so, but he repeated she should “fucking report it.”

9 He and Gonzales walked up the street to the gas station where
10 Valenciano was supposed to pick him up. He stopped in the station’s
store to buy a drink, and heard a man say in broken English that he had
just seen his friend shot.

11 Valenciano picked them up, dropped Gonzales off and took Soto back
12 to his (Valenciano’s) house. Soto watched some television, then
13 walked to the Green Valley Apartments. The numerous calls he made
14 during this period to Julio Cabrera, Oscar Cabrera, Gonzales,
Valenciano and Hernandez were simply him trying to find a ride. He
eventually met up with Oscar and spent the night at the Cabrera
residence. He did not see Martinez at the Cabrera house.

15 From that day to the date of his arrest, he never asked Gonzales about
16 the car or what Gonzales was doing that morning, even after
17 Hernandez told him about the shooting. He did not want to be
involved or go back to prison. He repeatedly said he never asked
Hernandez whether she gave his name to police, though on
cross-examination he admitted he might have told her not to mention
his name.

19 While incarcerated, Soto often talked to Aluni about his case,
20 discussing how Martinez’s statements were inconsistent, among other
21 things. Soto also had “stacks of discovery” papers in his cell and
Aluni was sometimes alone in Soto’s cell FN10 when Soto would get
a visit from his lawyer or family.

22 FN10. Soto admitted Aluni was not one of his
23 cellmates.

24 Aluni gave Soto a letter at some point, saying “Give this to your
25 attorney” and Soto did so, without looking at the letter. After that,
26 Soto’s attorney told Soto to be careful around Aluni. When asked how
27 he knew the contents of that letter, since it was not part of the
discovery, Soto said a different letter from Aluni to a deputy district
attorney, which was part of the discovery, mentioned that Aluni had
written a similar letter to Soto’s attorney. Soto never threatened Aluni
at any time, but Aluni was lying in exchange for a reduced sentence.

1 *Soto*, at *14-*15.

2 B. Procedural History

3 A jury trial was held for Mr. Soto and Mr. Valenciano in Santa Cruz County Superior Court
4 in 2009.² Following the jury trial, Mr. Soto was convicted of conspiracy to commit robbery, first
5 degree murder, five counts of robbery, and two counts of attempted second degree robbery.
6 Sentence enhancement allegations that the crimes were for the benefit of a criminal street gang and
7 for personal use and discharge of a firearm were found true. Mr. Soto was sentenced to a total of 84
8 years to life in prison.

9 Mr. Soto appealed. The California Court of Appeal affirmed the judgment of conviction.

10 See Resp. Exs. 3 and 4. The California Supreme Court denied Mr. Soto's petition for review.

11 See Resp. Ex. 6.

12 Mr. Soto then filed this action. His petition contends that the admission of an out-of-court
13 hearsay statement violated his federal constitutional rights to confrontation and due process.

14 **III. JURISDICTION AND VENUE**

15 This Court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C.
16 § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the
17 conviction and sentence of a person convicted in Santa Cruz County, California, which is within this
18 judicial district. 28 U.S.C. §§ 84, 2241(d).

19 **IV. STANDARD OF REVIEW**

20 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
21 custody pursuant to the judgment of a State court only on the ground that he is in custody in
22 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

23 The Antiterrorism And Effective Death Penalty Act of 1996 (“AEDPA”) amended § 2254 to
24 impose new restrictions on federal habeas review. A petition may not be granted with respect to any
25 claim that was adjudicated on the merits in state court unless the state court’s adjudication of the

27 _____
28 ² Messrs. Soto, Valenciano and Gonzales were originally charged together. In November
2005, the trial court granted the motion to sever the trial of Messrs. Soto and Valenciano from that
of Mr. Gonzales. *Soto*, at *1 & n.1.

1 claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of,
2 clearly established Federal law, as determined by the Supreme Court of the United States; or
3 (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the
4 evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

5 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court
6 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the
7 state court decides a case differently than [the] Court has on a set of materially indistinguishable
8 facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

9 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the
10 state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but
11 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal
12 habeas court may not issue the writ simply because that court concludes in its independent judgment
13 that the relevant state-court decision applied clearly established federal law erroneously or
14 incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. “A federal habeas
15 court making the ‘unreasonable application’ inquiry should ask whether the state court’s application
16 of clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409.

17 V. DISCUSSION

18 A. Confrontation Clause Claim

19 A little more than a decade ago, the Supreme Court’s decision in *Crawford v. Washington*,
20 541 U.S. 36 (2004), dramatically changed Confrontation Clause jurisprudence, and abandoned the
21 analytic framework from *Ohio v. Roberts*, 448 U.S. 56 (1980), that had been used for many years.
22 Mr. Soto’s habeas petition contends that *Crawford* left the *Roberts* test intact for a subset of cases in
23 which the evidence at issue was nontestimonial hearsay and that, applying the *Roberts* test, a
24 Confrontation Clause violation occurred when certain nontestimonial hearsay was admitted at his
25 trial. His argument fails because the Supreme Court and lower courts have determined that
26 *Crawford* did not leave the *Roberts* test intact; instead, the rule now is that the Confrontation Clause
27 simply does not apply to nontestimonial evidence. The California Court of Appeal erred in its
28 analysis by applying the outdated *Roberts* test to deny Mr. Soto’s claim. Nonetheless, because no

1 Confrontation Clause violation occurred, Mr. Soto is not entitled to federal habeas relief. The
2 analysis is explained in more detail below.

3 1. California Court of Appeal Decision³

4 The California Court of Appeal rejected Mr. Soto's Confrontation Clause claim in an
5 analysis that was somewhat confusing and ultimately applied the wrong legal standard to the federal
6 constitutional claim.

7 [1]⁴ Valenciano and Soto argue the trial court should have sustained
8 their hearsay objections to the statements Gonzales made to Martinez,
9 his girlfriend and mother of his child. The court found the statements
10 were nontestimonial and admissible under the declaration against
11 interest rule. The one false part of Gonzales' statement, i.e., where he
12 denied being the shooter, did not make the remaining statements
unreliable, but instead was Gonzales' attempt to tell Martinez what
happened without admitting that he was, in fact, a murderer. Soto and
Valenciano concede that the statements were nontestimonial and limit
their challenge to their admission under the declaration against interest
exception.

13 [2] A criminal defendant has the right under both the federal and state
14 Constitutions to confront the witnesses against him. (U.S. Const., 6th
15 Amend.; Cal. Const., art. I, § 15.) In *Crawford v. Washington* (2004)
16 541 U.S. 36 (*Crawford*), the United States Supreme Court held that,
17 under the confrontation clause, “[t]estimonial statements of witnesses
18 absent from trial” are admissible “only where the declarant is
19 unavailable, and only where the defendant has had a prior opportunity
20 to cross-examine [the witness].” (*Id.* at p. 59, fn. omitted.) “Under
Crawford, . . . the Confrontation Clause has no application to
[out-of-court, nontestimonial statements not subject to prior
cross-examination] and therefore permits their admission even if they
lack indicia of reliability.” (*Whorton v. Bockting* (2007) 549 U.S. 406,
420; *see also Davis v. Washington* (2006) 547 U.S. 813, 821.) “Where
nontestimonial hearsay is at issue, it is wholly consistent with the
Framers’ design to afford the States flexibility in their development of
hearsay law” (*Crawford, supra*, at p. 68.)

22

23 ³ When there is a reasoned decision by the intermediate court, followed by a summary denial
24 of the petition for review by the California Supreme Court, this Court will look through summary
denials to the last reasoned decision and apply § 2254(d) to that decision. *See Cannedy v. Adams*,
25 706 F.3d 1148, 1159 (9th Cir.), *amended*, 733 F.3d 794 (9th Cir. 2013). Here, the California Court
of Appeal’s rejection of the Confrontation Clause claim was a reasoned decision, and was followed
by a summary denial of the petition for review in the California Supreme Court. Thus, the
California Court of Appeal’s reasoned decision is the one to which § 2254(d) is applied for the
Confrontation Clause claim.

27 ⁴ This Court has added the bracketed numbers at the beginning of each of the paragraphs of
28 the California Court of Appeal’s analysis because this Court’s analysis will refer to the particular
paragraphs in that court’s discussion.

1 [3] The veracity of nontestimonial hearsay statements is sufficiently
 2 dependable to allow the untested admission of such statements against
 3 a defendant when (1) the evidence falls within a firmly rooted hearsay
 4 exception or (2) the evidence contains “particularized guarantees of
 5 trustworthiness” such that adversarial testing would be expected to add
 6 little, if anything, to the statements’ reliability. (*Ohio v.*
 7 *Roberts* (1980) 448 U.S. 56, 66; *Crawford, supra*, 541 U.S. at p. 68.)
 8 In *Lilly v. Virginia* (1999) 527 U.S. 116 (*Lilly*), a plurality of the court
 9 held that “accomplices’ confessions that inculpate a criminal
 10 defendant are not within a firmly rooted exception to the hearsay rule
 11 as that concept has been defined in our Confrontation Clause
 12 jurisprudence.” (*Id.* at p. 134, fn. omitted.) “This, of course, does not
 13 mean, . . . that the Confrontation Clause imposes a “blanket ban on the
 14 government’s use of [nontestifying] accomplice statements that
 15 incriminate a defendant.” Rather it simply means that the government
 16 must satisfy the second prong of the *Ohio v. Roberts*, 448 U.S. 56
 17 (1980) test[, that the statements bear a particularized guarantee of
 18 trustworthiness,] in order to introduce such statements.” (*Id.* at p. 134,
 19 fn. 5.) On appeal, we conduct a de novo review to determine whether
 20 that trustworthiness test has been satisfied. (*Id.* at ¶ 136-137.)

21 [4] “In California, ‘[e]vidence of a statement by a declarant having
 22 sufficient knowledge of the subject is not made inadmissible by the
 23 hearsay rule if the declarant is unavailable as a witness and the
 24 statement, when made, . . . so far subjected him to the risk of . . . criminal
 25 liability . . . that a reasonable man in his position would not have made
 26 the statement unless he believed it to be true.’ ([Evid.Code,] § 1230.)
 27 The proponent of such evidence must show that the declarant is
 28 unavailable, that the declaration was against the declarant’s penal
 interest when made and that the declaration was sufficiently reliable to
 warrant admission despite its hearsay character.” (*People v. Duarte*
 (2000) 24 Cal.4th 603, 610–611.) “To determine whether [a
 particular] declaration [against penal interest] passes [Evidence Code]
 [section 1230’s] required threshold of trustworthiness, a trial court
 “may take into account not just the words but the circumstances under
 which they were uttered, the possible motivation of the declarant, and
 the declarant’s relationship to the defendant.”” [Citation.] We have
 recognized that, in this context, assessing trustworthiness ““requires
 the court to apply to the peculiar facts of the individual case a broad
 and deep acquaintance with the ways human beings actually conduct
 themselves in the circumstances material under the exception.”””
 (*Id.* at p. 614.)

29 [5] “There is no litmus test for the determination of whether a
 30 statement is trustworthy and falls within the declaration against [penal]
 31 interest exception. The trial court must look to the totality of the
 32 circumstances in which the statement was made, whether the declarant
 33 spoke from personal knowledge, the possible motivation of the
 34 declarant, what was actually said by the declarant and anything else
 35 relevant to the inquiry.” (*People v. Greenberger* (1997) 58
 36 Cal.App.4th 298, 334 (*Greenberger*)). “When examining what was
 37 actually said by the declarant special attention must be paid to any
 38 statements that tend to inculpate the nondeclarant. This is so because
 39 a statement’s content is most reliable in that portion which inculpates
 40 the declarant. It is least reliable in that portion which shifts

1 responsibility. Controversy necessarily arises when the declarant
2 makes statements which are self-inculpatory as well as inculpatory of
3 another. This is why Evidence Code section 1230 only permits an
4 exception to the hearsay rule for statements that are specially
5 disserving of the declarant's penal interest. [Citation.] This is not to
6 say that a statement that incriminates the declarant and also inculpates
7 the nondeclarant cannot be specifically disserving of the declarant's
8 penal interest. Such a determination necessarily depends upon a
9 careful analysis of what was said and the totality of the
10 circumstances." (*Id.* at p. 335.)

11 [6] The Court of Appeal in *Greenberger* considered out-of-court
12 statements made by some defendants implicating other defendants.
13 The court held that "a defendant's declarations against [penal] interest
14 may be received in a joint trial without denying the codefendant the
15 right of confrontation guaranteed by the United States Constitution."
16 (*Greenberger, supra*, 58 Cal.App.4th at p. 314.) "Since declarations
17 against [penal] interest may be admitted in evidence without doing
18 violence to the confrontation clause, we see no reason why such
19 declarations, when made by a codefendant, should not also be
20 admissible." (*Id.* at p. 332.)

21 [7] In *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*),
22 a nontestifying codefendant, Morales, inculpated himself and his two
23 codefendants, Cervantes and Martinez, in a murder and an attempted
24 murder while speaking to a friend of all three defendants, Ojeda. (*Id.*
25 at ¶ 166–167.) On appeal the two codefendants contended that
26 Morales' statement to the friend should have been excluded. (*Id.* at p.
169.) The appellate court found that the trial court did not err in
admitting evidence of the statement at the defendants' joint trial.
Following *Greenberger*, the court found that the statement qualified as
a declaration against penal interest and satisfied the constitutional
standard of trustworthiness. (*Id.* at p. 177.) "The evidence here
showed Morales made the statement within 24 hours of the shooting to
a lifelong friend from whom he sought medical treatment for injuries
sustained in the commission of the offenses.... Regarding the content
of the statement, Morales did not attribute blame to Cervantes and
Martinez but accepted for himself an active role in the crimes and
described how he had directed the activities of Martinez." (*Id.* at p.
175.) "Ojeda consistently reported that Morales admitted shooting at
the second male with Cervantes. The statement Cervantes shot the first
male, as well as the statement Morales shot at the second male, both
incriminated Morales because Morales was acting in concert with
Cervantes at all relevant times. Thus, the discrepancies in the
statement as repeated by Ojeda does not preclude a finding the
statement was trustworthy." (*Id.* at p. 176.) "Regarding the claim the
statement should have been redacted to exclude reference to the
nondeclarants, *Greenberger* specifically held this is not required
where the statement admitted into evidence is disserving to the
interests of the declarant. We agree with *Greenberger* 's analysis on
this point." (*Ibid.*)

27 [8] Here, the statements by Gonzales implicated him, as well as Soto
28 and Valenciano, in the robbery and murder. Gonzales described to
Martinez how the robbery and murder were committed, who was

involved in it, and in what manner, and thereby admitted that he was acting in concert with Soto and Valenciano at all relevant times. The statements were not made to the police during questioning and Gonzales' only effort to mitigate his own conduct or shift the blame was to consistently deny pulling the trigger. At the time Gonzales made the statements, his only motive to lie was to keep Martinez, the mother of his child, from knowing he had blown someone's head open with a shotgun. “[T]he most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures.” (*Greenberger, supra*, 58 Cal.App.4th at p. 335; *Cervantes, supra*, 118 Cal.App.4th at p. 175.) After independently reviewing the record, we find that the statements Gonzales made to Martinez bore a particularized guarantee of trustworthiness. Accordingly, admission of the statements did not violate the federal or state Constitutions or state law. (*Lilly, supra*, 527 U.S. at ¶ 136-137; *Ohio v. Roberts, supra*, 448 U.S. at p. 66; *Cervantes, supra*, 118 Cal.App.4th at p. 177.)

10 | *Soto*, at *16-*18.

2. The Confrontation Clause - *Crawford* Works A Major Change

12 The Confrontation Clause of the Sixth Amendment provides that in criminal cases the
13 accused has the right to “be confronted with witnesses against him.” U.S. Const. amend. VI. The
14 ultimate goal of the Confrontation Clause “is to ensure reliability of evidence, but it is a procedural
15 rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability
16 be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541
17 U.S. at 61.

18 The Confrontation Clause applies to all “testimonial” statements. *See Crawford*, 541 U.S. at
19 50-51. “Testimony . . . is typically a solemn declaration or affirmation made for the purpose of
20 establishing or proving some fact.” *Id.* at 51 (internal quotation marks and brackets omitted); *see*
21 *id.* at 51 (“An accuser who makes a formal statement to government officers bears testimony in a
22 sense that a person who makes a casual remark to an acquaintance does not.”); *id.* at 68 (“[w]hatever
23 else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a
24 grand jury, or at a former trial; and to police interrogations”). In *Davis v. Washington*, 547 U.S. 813
25 (2006), the Supreme Court distinguished testimonial and nontestimonial statements to police.
26 “Statements are nontestimonial when made in the course of police interrogation under circumstances
27 objectively indicating that the primary purpose of the interrogation is to enable police assistance to
28 meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that

1 there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish
2 or prove past events potentially relevant to later criminal prosecution.” *Id.* at 822; *see, e.g., id.* at
3 826-28 (victim’s frantic statements to a 911 operator naming her assailant who had just hurt her
4 were not testimonial); *id.* at 829-30 (victim’s statements to officer telling him what had happened
5 were testimonial, as there was no emergency in progress and were made after police officer had
6 separated victim and assailant); *Crawford*, 541 U.S. at 39-40, 68 (statements were testimonial where
7 made by witness at police station to a series of questions posed by an officer who had given
8 *Miranda* warnings to witness and was taping and making notes of the answers).

9 Before *Crawford* was decided, the Confrontation Clause analysis had been governed by the
10 “indicia of reliability” test set out in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Under the
11 *Roberts* test, hearsay statements could be introduced only if the witness was unavailable at trial and
12 the statements had “adequate indicia of reliability,” i.e., the statements fell within a “firmly rooted
13 hearsay exception” or bore “particularized guarantees of trustworthiness.” *Roberts*, 448 U.S. at 66.
14 *Roberts* was overruled in *Crawford*, although some readers of the *Crawford* opinion believed that
15 *Roberts* was not overruled as to nontestimonial statements. Two years later, the Supreme Court
16 clarified in *Davis v. Washington*, 547 U.S. 813, 821 (2006), that the *Roberts* test had *no* continuing
17 validity. Nontestimonial hearsay, “while subject to traditional limitations upon hearsay evidence, is
18 not subject to the Confrontation Clause.” *Davis*, 547 U.S. at 821. The Supreme Court made the
19 same point again the following term, when it referred to “*Crawford*’s elimination of Confrontation
20 Clause protection against the admission of unreliable out-of-court nontestimonial statements.”
21 *Whorton v. Bockting*, 549 U.S. 406, 420 (2007).

22 In an en banc decision, the Ninth Circuit has recognized that the *Roberts* test no longer
23 survives, and that nontestimonial statements are now outside the scope of the protection of the
24 Confrontation Clause. *See United States v. Larson*, 495 F.3d 1094, 1099 n.4 (9th Cir. 2007) (en
25 banc). The court explained that earlier it was unresolved whether the *Roberts* test “to determine the
26 admissibility of out-of-court nontestimonial statements survived *Crawford*,” but the Supreme Court
27 then clarified in *Bockting*, 549 U.S. 406, “that *Crawford* ‘eliminat[es] Confrontation Clause
28 protection against the admission of unreliable out-of-court non-testimonial statements’ and that ‘the

1 Confrontation Clause has no application to such statements and therefore permits their admission
2 even if they lack indicia of reliability.”” *Larson*, 495 F.3d at 1099 n.4; *see also Delgadillo v.*
3 *Woodford*, 527 F.3d 919, 924 (9th Cir. 2008) (“*Crawford* rejected [the *Roberts*] framework for
4 analyzing Confrontation Clause violations,” and nontestimonial statements no longer raise
5 Confrontation Clause concerns).

6 Other circuits also have concluded that the Confrontation Clause no longer applies to
7 nontestimonial hearsay statements, although they have not all agreed on whether it was *Crawford*,
8 *Davis* or *Bockting* that sounded the death knell. *See United States v. Castro-Davis*, 612 F.3d 53, 64
9 n.14 (1st Cir. 2010) (“until *Davis*, *Roberts* remained the controlling precedent for judging whether
10 non-testimonial hearsay violated the Confrontation Clause. After *Davis*, however, non-testimonial
11 hearsay no longer implicates the Confrontation Clause at all”); *United States v. Smalls*, 605 F.3d
12 765, 774 (10th Cir. 2010) (*Davis* “squarely confronted the issue of whether the Confrontation Clause
13 had any application to nontestimonial hearsay statements, or, in other words, whether any portion of
14 *Roberts* remained good law. In *Davis*, the Court placed the question of the admissibility of
15 nontestimonial hearsay statements entirely outside the confines of the Confrontation Clause and
16 rendered *Roberts* academic”); *United States v. Johnson*, 581 F.3d 320, 325 (6th Cir. 2009) (although
17 it had been an open question whether nontestimonial statements continued to be governed by the
18 *Roberts* test after *Crawford*, the Supreme Court’s later decisions in *Davis* and *Bockting* answered the
19 question in the negative).

20 3. Analysis of Federal Habeas Claim

21 The California Court of Appeal’s analysis of Mr. Soto’s Confrontation Clause claim
22 confusingly articulated the correct legal standard in one paragraph, but then applied the incorrect
23 legal standard in later paragraphs. The first paragraph of the analysis framed the issue. The state
24 appellate court first noted that the trial court had found that the statements were nontestimonial and
25 admissible under the declaration against interest exception to the hearsay rule. The state appellate
26 court then noted that the defendants had conceded that the statements were nontestimonial and had
27 limited their challenge to the trial court’s ruling that the statements were admissible under the
28 hearsay exception for declarations against interest. *See* Cal. Evid. Code § 1230. In the second

1 paragraph, the state appellate court identified the correct legal rule, i.e., that the Confrontation
 2 Clause has no application to nontestimonial hearsay following *Crawford*, *Davis* and *Bockting*. The
 3 problem arises in the third paragraph of the discussion because there the California Appellate Court
 4 cited and revived the *Roberts* test, indicating that the *Roberts* test was the test for determining
 5 whether the admission of the nontestimonial hearsay statements could be admitted without offending
 6 the Confrontation Clause. The next five paragraphs of the analysis considered California law on
 7 hearsay to determine whether the hearsay statements “bore a particularized guarantee of
 8 trustworthiness.” *Soto*, at *18. The final two sentences and citations in the eighth paragraph show
 9 that the California Court of Appeal applied *Roberts* to determine that no Confrontation Clause
 10 violation had occurred. First, the California Court of Appeal stated that it had “independently
 11 review[ed] the record,” – a requirement from the outdated analysis in *Lilly*⁵ that had been mentioned
 12 in the troublesome third paragraph of the California Court of Appeal’s decision. Second, the
 13 California Court of Appeal found “that the statements Gonzales made to Martinez bore a
 14 particularized guarantee of trustworthiness” – a phrase that is part of the *Roberts* test. And third, the
 15 California Court of Appeal cited *Lilly* and *Roberts*, but not *Crawford*, *Davis* or *Bockting*, as support
 16 for its conclusion that the “admission of the statements did not violate the federal or state
 17 Constitutions or state law.” *Soto*, at *18.

18 A state court’s “mistakes in reasoning or in predicate decisions” such as using the wrong
 19 legal rule or framework “constitute error under the ‘contrary to’ prong of § 2254(d)(1).” *Frantz v.*
 20 *Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) (en banc) (state court’s review of claim for interference
 21 with right to self-representation for harmlessness was contrary to clearly established Supreme Court
 22 precedent holding that it was structural error). In such a case, habeas relief is not automatically
 23 granted; rather, the federal court must do a de novo review of the constitutional issue raised. *Id.* at
 24 735 (citing *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). In deciding whether there is a §
 25 2254(d)(1) error, the federal court’s analysis is confined to the state court’s actual decisions and
 26

27

 28 ⁵ *Lilly* applied the *Roberts* test to a nontestifying accomplice’s confession made to the police
 during a custodial interrogation by the police, i.e., testimonial hearsay. *See Lilly*, 527 U.S. at 120-21.

1 analysis, but in doing the de novo review once such an error is found, the federal court is not limited
2 to the reasoning of the state court. *Id.* at 737-39; *see, e.g., Moore v. Biter*, 725 F.3d 1184, 1193 (9th
3 Cir. 2013) (after finding state court decision “contrary to” federal law because it failed to apply the
4 correct federal rule for sentencing of juvenile offenders, Ninth Circuit conducted de novo review of
5 issue and found error).

6 Here, by applying the *Roberts* test, the California Court of Appeal used the wrong legal
7 framework to evaluate Mr. Soto’s Confrontation Clause claim. The Supreme Court’s *Crawford*,
8 *Davis* and *Bockting* decisions had clearly established that the *Roberts* test no longer applied and that
9 nontestimonial hearsay evidence was not covered by the Confrontation Clause. The California
10 Court of Appeal’s use of the wrong rule (i.e., the *Roberts* test) “constitute[d] error under the
11 ‘contrary to’ prong of § 2254(d)(1).” *Frantz*, 533 F.3d at 734. That does not mean that Mr. Soto
12 obtains habeas relief as a bonus for the state court’s error; instead, it means that this Court must do a
13 de novo review of the Confrontation Clause claim. *See id.*

14 A de novo review is a simple matter here because there is a bright line rule: the
15 Confrontation Clause does not apply to nontestimonial hearsay. *See Bockting*, 549 U.S. at 420;
16 *Davis*, 547 U.S. at 821; *Crawford*, 541 U.S. at 50-51; *Larson*, 495 F.3d at 1099 n.4; *Delgadillo*, 527
17 F.3d at 924. Mr. Soto conceded in state court that the statements were nontestimonial, as he
18 identified them as “nontestimonial statements,” and the thrust of his argument in his petition for
19 review was that *Crawford* did not apply because the *Roberts* test remained intact for nontestimonial
20 statements such as Mr. Gonzales’ statements to Ms. Martinez. Resp. Ex. 5 (Petition for Review, p.
21 5; *see also id.* at 10 (“Gonzalez’s statements to Vanessa [Martinez] do not appear to be testimonial
22 within the meaning of *Crawford* or *Davis*”). Mr. Soto does not contend that the statements of Mr.
23 Gonzales to Ms. Martinez were testimonial, nor would such an argument be well-founded because
24 their boyfriend-to-girlfriend communications were just the sort of communications that courts have
25 repeatedly held to be nontestimonial and therefore outside the protection of the Confrontation
26 Clause. *See, e.g., Desai v. Booker*, 732 F.3d 628, 630 (6th Cir. 2013) (“the Confrontation Clause no
27 longer applied to nontestimonial hearsay such as the friend-to-friend confession”); *United States v.*
28 *DeLeon*, 678 F.3d 317, 321-24 (4th Cir. 2012), *judgment vacated on other grounds*, 133 S. Ct. 2850

1 (2013) (admission of evidence of stepson's statements describing his defendant-stepfather's
2 disciplinary methods to social worker made several months before the stepson died did not implicate
3 the Confrontation Clause because they were made for purposes of formulating a family treatment
4 plan and were not testimonial); *United States v. Berrios*, 676 F.3d 118, 127-28 (3d Cir. 2012)
5 (admission of evidence of surreptitiously recorded jailhouse conversations between codefendants did
6 not violate the Confrontation Clause because they were not testimonial).

7 Mr. Soto argues that the *Roberts* test applies to his case, notwithstanding the decision in
8 *Crawford*. He argues that "it is [an] *open question* as to whether the admission of non-testimonial
9 statements violate the Confrontation Clause under the traditional test of reliability announced in"
10 *Roberts*. Resp. Ex. 5, Petition for Review, p. 10. This argument fails because, as explained in
11 Section "2" above, the Supreme Court and the Ninth Circuit have firmly said that the *Roberts* test no
12 longer applies and that the Confrontation Clause does not apply to nontestimonial hearsay.

13 Mr. Soto also argues that the fact that *Crawford* did not overrule *Lilly v. Virginia*, 527 U.S.
14 116 (1999), supports his argument that the *Roberts* test survives because *Lilly* had applied the
15 *Roberts* test for reliability and trustworthiness. *See* Resp. Ex. 5, Petition for Review, p. 11; *see also*
16 Docket # 1 at 26-30 (legal argument in his federal habeas petition consists almost entirely of a
17 lengthy quote from *Lilly*). Mr. Soto's reliance on *Lilly* does not help him because the evidence at
18 issue in *Lilly* was a confession made during police interrogation, *see Lilly*, 527 U.S. at 120-21, and
19 therefore was testimonial hearsay of just the sort that *Crawford* determined was covered by the
20 Confrontation Clause. *Crawford* recognized that very point in its reference to *Lilly*, as *Crawford*
21 noted that even where its recent cases (including *Lilly*) had followed the reasoning of *Roberts*, those
22 cases made a distinction for testimonial hearsay, and testimonial hearsay required unavailability and
23 prior cross-examination. *See Crawford*, 541 U.S. at 58 (*Lilly* "excluded testimonial statements that
24 the defendant had had no opportunity to test by cross-examination"); *see also Davis*, 547 U.S. at
25 825. Thus, the fact that the Supreme Court did not overrule *Lilly* (which concerned testimonial
26 hearsay) does not provide any support for the argument that the *Roberts* test survives or that the
27 Confrontation Clause continues to apply to nontestimonial hearsay. Mr. Soto sees his case and
28 *Lilly* as similar because both involved confessions by accomplices, but the critical difference in this

1 post-*Crawford* time is that the confession in Mr. Soto's case was to a girlfriend (and nontestimonial)
 2 whereas the *Lilly* confession was during police interrogation (and, therefore, testimonial). *See*
 3 generally *United States v. Smalls*, 605 F.3d 765, 773 (10th Cir. 2010) (district court erred in
 4 applying *Roberts* test to accomplice's statement to confidential informant because it was
 5 nontestimonial; "*Roberts* was no longer good law when the district court made its decision in this
 6 case, rendering *Lilly* a dead letter and eviscerating not only the presumption of unreliability, but the
 7 entire foundation upon which the district court's order rested").

8 The admission of the nontestimonial hearsay statements from Mr. Gonzales to Ms. Martinez
 9 did not implicate, let alone violate, Mr. Soto's Confrontation Clause rights. He is not entitled to
 10 habeas relief on this claim.

11 B. Due Process Claim

12 Mr. Soto also argues that the admission of Mr. Gonzales' statements to Ms. Martinez
 13 violated his right to due process because the evidence was unreliable hearsay. *See* Docket # 1 at 8.

14 Neither the California Court of Appeal nor the California Supreme Court discussed Mr.
 15 Soto's due process claim. "When a federal claim has been presented to a state court and the state
 16 court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in
 17 the absence of any indication or state-law procedural principles to the contrary." *Harrington v.*
 18 *Richter*, 562 U.S. 86, 99 (2011) (one-sentence order denying habeas petition analyzed under
 19 §2254(d)); *see also Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013) (order discussing state law
 20 claim but not federal claim rebuttably presumed to be rejection on the merits and therefore subject to
 21 § 2254(d)). Mr. Soto does not dispute that the state supreme court decided his claim on the merits.

22 The summary rejection of the due process claim by the California Supreme Court was neither
 23 contrary to nor an unreasonable application of clearly established United States Supreme Court
 24 authority. In addition, the state court's decision was not based on an unreasonable determination of
 25 the facts.

26 The Supreme Court has repeatedly held that federal habeas writ is unavailable for violations
 27 of state law or for alleged error in the interpretation or application of state law. *See Swarthout v.*
 28 *Cooke*, 562 U.S. 216, 220 (2011). Thus, to the extent Mr. Soto is urging that the California

1 Evidence Code's hearsay rule was misapplied in state court, it would be a claim for a state law error
2 for which federal habeas relief is not available.

3 A state court's evidentiary ruling is not subject to federal habeas review unless the ruling
4 violates federal law, either by infringing upon a specific federal constitutional or statutory provision
5 or by depriving the defendant of the fundamentally fair trial guaranteed by due process. *See Pulley*
6 *v. Harris*, 465 U.S. 37, 41 (1984). The Supreme Court "has not yet made a clear ruling that
7 admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient
8 to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009)
9 (finding that trial court's admission of irrelevant pornographic materials was "fundamentally unfair"
10 under Ninth Circuit precedent but not contrary to, or an unreasonable application of, clearly
11 established Federal law under § 2254(d)). Absent violation of a specific constitutional or statutory
12 provision, the due process inquiry in federal habeas review is whether the admission of evidence
13 was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45
14 F.3d 1355, 1357 (9th Cir. 1995). Here, the admission of Mr. Gonzales' statement to Ms. Martinez
15 which implicated himself along with Mr. Soto did not render the trial fundamentally unfair. Mr.
16 Soto fails to demonstrate that admission of the statement violated state evidentiary rules; as the
17 Court of Appeal noted, statement was admissible hearsay under Evid. Code § 1230 as a declaration
18 against the declarant's personal interest which was imbued with reliability and trustworthiness.
19 Given the state court's finding that the statement was sufficiently trustworthy so as to satisfy state
20 evidentiary rules, admission of Gonzales' statement was not so arbitrary or prejudicial as to render
21 the Mr. Soto's trial fundamentally unfair. Furthermore, even if admission of the statement violated
22 state evidence rules and was so arbitrary as to violate due process, Petitioner is not entitled to habeas
23 relief unless the evidence had a "substantial and injurious effect on the verdict." *Dillard v. Roe*,
24 244 F.3d 758, 767 n.7 (9th Cir. 2001) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).
25 Given the strength of the evidence against Mr. Soto, no such effect can be found in the instant case.

26 Moreover, the Ninth Circuit has held (albeit in a different context) that, where a habeas
27 petitioner challenges his conviction based on the allegedly erroneous admission of evidence, as long
28 as there is some permissible inference that may be drawn, the introduction of such evidence does not

1 violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). “Evidence
2 introduced by the prosecution will often raise more than one inference, some permissible, some not;
3 we must rely on the jury to sort them out in light of the court’s instructions. Only if there are
4 *no* permissible inference they jury may draw from the evidence can its admission violate due
5 process. Even then, the evidence must ‘be of such quality as necessarily prevents a fair trial.’
6 [Citation] Only under such circumstances can it be inferred that the jury must have used the
7 evidence for an improper purpose.” *Jammal*, 926 F.2d at 920 (footnote omitted). Here, there was a
8 permissible inference that could be drawn from Gonzales’ statement – that Soto was involved in the
9 crime.

10 Accordingly, Mr. Soto is not entitled to relief on his due process claim.

11 C. A Certificate Of Appealability Will Not Issue

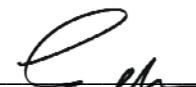
12 Mr. Soto has not “made a substantial showing of the denial of a constitutional right,” 28
13 U.S.C. § 2253(c)(2), and this is not a case in which “reasonable jurists would find the district court’s
14 assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484
15 (2000). Accordingly, a certificate of appealability is **DENIED**.

16 **VI. CONCLUSION**

17 The petition for writ of habeas corpus is **DENIED** on the merits. The Clerk shall close the
18 file.

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20 IT IS SO ORDERED.

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22 Dated: March 25, 2015

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24 
EDWARD M. CHEN
United States District Judge

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